

House Bill 1358

By: Representatives Lunsford of the 110th, England of the 108th, Harbin of the 118th, Channell of the 116th, Martin of the 47th, and others

A BILL TO BE ENTITLED

AN ACT

To amend Article 3 of Chapter 5 of Title 50 of the Official Code of Georgia Annotated, relating to state purchasing, so as to require that the price paid by the state for sealed bids shall not exceed the price offered to other customers; to require the solicitation of competitive sealed bids prior to renewing certain state-wide contracts; to provide for definitions of terms; to provide for an effective date; to provide for applicability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Article 3 of Chapter 5 of Title 50 of the Official Code of Georgia Annotated, relating to state purchasing, is amended by revising subsection (a) of Code Section 50-5-67, relating to competitive bidding procedure, method of soliciting bids, required conditions for competitive sealed proposals, clarification, contract awards, negotiation of contracts, certificate of independent price determination, and receiving electronic bids, as follows:

"(a) Except as otherwise provided in this Code section, contracts exceeding \$100,000.00 shall be awarded by competitive sealed bidding. If the total requirement of any given commodity will involve an expenditure in excess of \$250,000.00, sealed bids shall be solicited by advertisement in the Georgia Procurement Registry established under subsection (b) of Code Section 50-5-69 and in addition may be solicited by advertisement in a newspaper of state-wide circulation at least once and at least 15 calendar days, except for construction projects which shall have 30 calendar days allowed, prior to the date fixed for opening of the bids and awarding of the contract. Other methods of advertisement, however, may be adopted by the Department of Administrative Services when such other methods are deemed more advantageous for the particular item to be purchased. In any event, it shall be the duty of the Department of Administrative Services to solicit sealed bids from reputable owners of supplies in all cases where the total requirement will exceed \$100,000.00. All purchases or contracts for purchases resulting from sealed bids shall be

27 made subject to the condition that the price paid by the state shall not at any time prior to
28 the expiration of the bid and the term of any resulting contract, including any extensions
29 or renewals, exceed the price which may be offered by the supplier to any other customer
30 for similar quantities of the particular item or service to be purchased under similar
31 delivery conditions. When it appears that the use of competitive sealed bidding is either
32 not justified or not advantageous to the state, a contract may be entered into by competitive
33 sealed proposals, subject to the following conditions:

34 (1) This method of solicitation shall only be used after a written determination by the
35 Department of Administrative Services that the use of competitive sealed bidding is not
36 justified or is not advantageous to the state;

37 (2) Proposals shall be solicited through a request for proposals;

38 (3) Adequate public notice of the request for proposals shall be given in the same manner
39 as provided for competitive sealed bidding;

40 (4) A register of proposals shall be prepared and made available for public inspection;

41 (5) The request for proposals shall state the relative importance of price and other
42 evaluation factors;

43 (6) As provided in the request for proposals and under regulations to be developed by the
44 Department of Administrative Services, discussions may be conducted with qualified
45 offerors who submit proposals determined to be reasonably susceptible of being selected
46 for award, for the purpose of clarification to assure full understanding of and
47 responsiveness to the solicitation requirements. Offerors shall be accorded fair and equal
48 treatment with respect to any opportunity for discussion and clarification of proposals.
49 After such clarifications, revisions may be permitted to technical proposals and price
50 proposals prior to award for the purpose of obtaining best and final offers. The
51 Department of Administrative Services is authorized to solicit multiple revisions to price
52 proposals for the purpose of obtaining the most advantageous proposal to the state. In
53 conducting discussions or soliciting any revisions, there shall be no disclosure of any
54 information contained in proposals submitted by competing offerors. However, this
55 prohibition on disclosure of information shall not prohibit the Department of
56 Administrative Services from disclosing to competing offerors any preliminary rankings
57 and scores of competing offerors' proposals during the course of any negotiations or
58 revisions of proposals other than with respect to the procurement of construction
59 contracts; and

60 (7) The award shall be made to the responsible offeror whose proposal is determined in
61 writing to be the most advantageous to the state, taking into consideration price and the
62 evaluation factors set forth in the request for proposals. No other factors or criteria shall

be used in the evaluation. The contract file shall contain the basis on which the award is made."

SECTION 2.

Said article is further amended by adding a new Code section to read as follows:

"50-5-64.1.

(a) For purposes of this Code section, the term:

(1) 'Catalog price' means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, that is either published or otherwise available for inspection by customers, and includes prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public.

(2) 'Commercial item' means:

(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that:

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease, or license to the general public;

(B) Any item that evolved from an item described in subparagraph (A) of this paragraph through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a government solicitation;

(C) Any item that would satisfy the criteria in subparagraph (A) or (B) of this paragraph, but for the following:

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet state government requirements;

(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) of this paragraph that are of a type customarily combined and sold in combination to the general public;

(E) Installation services, maintenance services, repair services, training services, and other services if:

(i) Such services are procured for support of an item described in subparagraph (A), (B), (C), or (D) of this paragraph, regardless of whether such services are provided by the same source or at the same time as the item; and

(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the state government;

(F) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions;

(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) of this paragraph, regardless of whether the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(H) A nondevelopmental item, if the procuring agency determines that the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple state and local governments.

(3) 'Commercially available off-the-shelf item' means any item, equipment, service, or supply, including construction material that is a commercial item that is sold in substantial quantities in the commercial marketplace and offered to the state, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace.

(4) 'Market price' means the current price that is established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

(5) 'Minor modification' means a modification that does not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is a minor modification include but are not limited to the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as criteria in determining if a modification is a minor modification, but are not conclusive evidence thereof.

(6) 'State-wide contract' means a contract established by the Department of Administrative Services to provide a source of supplies, materials, equipment, or services for multiple state entities.

(b) Prior to renewing any state-wide contract for a commercially available off-the-shelf item that was procured by competitive sealed bidding, the Department of Administrative Services shall solicit competitive sealed bids for such item in accordance with Code Section 50-5-67. If the lowest responsive and responsible bid is lower than the state-wide contract cost and the bidder has submitted to the Department of Administrative Services

134 a signed contract with the same terms and conditions as the state-wide contract without
135 substantive exceptions, the Department of Administrative Services shall not renew the
136 state-wide contract. In determining whether the lowest responsive and responsible bid is
137 lower than the state-wide contract cost, the Department of Administrative Services shall
138 take into consideration the quality of the commercially available off-the-shelf items to be
139 supplied and conformity with the specifications which have been established and
140 prescribed, the purposes for which such items are required, the discount allowed for prompt
141 payment, the transportation charges, and the date or dates of delivery specified in the bid
142 and any other cost affecting the total cost of ownership during the life cycle of such items
143 as specified in the solicitation document."

144 **SECTION 3.**

145 (a) Sections 1, 3, and 4 of this Act shall become effective on July 1, 2010, and shall apply
146 to all competitive sealed bids solicited on or after that date.

147 (b) Section 2 of this Act shall become effective on January 1, 2011, and shall apply to any
148 renewal of a state-wide contract on or after that date.

149 **SECTION 4.**

150 All laws and parts of laws in conflict with this Act are repealed.